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No. 86-6139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA B. WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an employer's practice of committing employment decisions to the wholly subjective discretion of its supervisors which adversely affects minority employees may be tested under the disparate impact theory of proof of employment discrimination recognized by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)?

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OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 204) is reported at 798 F.2d 791 (5th Cir. 1986). The opinion of the District Court (J.A. 190) is not reported.

JURISDICTION

The judgment of the Court of Appeals (J.A. 253) was entered on August 27, 1986. A timely suggestion for rehearing *en banc* was denied on September 30, 1986. The petition for a writ of certiorari was filed on December 29, 1986, and was granted on June 22, 1987. (J.A. 311). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Sec. 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. secs. 2000e et seq., provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sec. 16(Q) of the U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978) (codified at 29 C.F.R. secs. 1607.1 et seq.), provides:

> *Selection Procedure*. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probation-

ary periods, and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

STATEMENT

In August, 1973, Clara Watson sought the position of teller at the Fort Worth Bank and Trust.[1] (J.A. 4-6). She was hired not as a teller but as a proof operator and assigned to duties that did not deal with the public.[2] (J.A. 5-6). The Bank is the closest bank in Tarrant County to the largest black population areas in Fort Worth.[3] Approximately half of the Bank's customers were black. (R. I 9-11). At the time Clara Watson went to work for the Bank, none of the Bank's four black employees (out of over sixty non-exempt employees) were employed in any job which dealt with the public.[4] At the time Clara Watson was advanced to teller at the Bank in January, 1976, she was the first black to ever hold that position.[5] No black had ever been a

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[1] Formerly the State Bank of East Fort Worth, the Bank's name became Fort Worth Bank & Trust in 1975. In 1978, it became part of a bank holding company, Fort Worth Bancshares, that was in turn owned by Southwest Bancshares, Inc. It is presently owned by MCorp, a bank holding company, and its name has again been changed to MBank East. The location of the Bank has not changed since 1975. (Shipp Deposition, pp. 10-11).

[2] Watson was a high school graduate and had nine hours of college credit in business related courses. She had worked for Montgomery Ward department store as a cashier for nine years before being employed by the Bank. (J.A. 190).

[3] In 1980, the City of Fort Worth was 22.8% black, the vast majority of that black population being concentrated in the near southside and Stop Six areas of Fort Worth. Both areas were within three miles of the Fort Worth Bank & Trust. (R. I 9-11; Shipp Deposition, pp. 11-14).

[4] The four employees included a black porter, kitchen attendant, and two check printers who worked in the basement. (J.A. 5-6).

[5] Her advancement came only after an EEOC complaint had been filed by another bank employee. (J.A. 6). When she first approached him about the bank teller position, Clara Watson stated that Gary Shipp, bank vice-president for personnel, replied, "I don't know girl, it's a big responsibility" and "It's a lot of money, you know, for blacks to have to count." (J.A. 7).

director or officer of the Bank. No black had ever served in a managerial capacity in the Bank through the trial of this cause. (J.A. 50-51). At a time when the Bank's nonexempt employees numbered close to eighty, no black had ever served as a supervisor at the Bank.[6] (J.A. 50-53). After serving five years as a motor bank teller and as a commercial teller inside the Bank lobby, Clara Watson sought promotion in February of 1980 to a supervisory position as supervisor of the lobby tellers. (J.A. 7, 30-38). The position was also sought by another black teller, Sylvia Harden. (J.A. 18-19). Richard Burt, a white male, was selected for the job. (J.A. 12-13, 18-19).[7] After Burt's selection as lobby supervisor the position of motor bank supervisor opened, and both Watson and Harden also sought that position. Pat Cullar, a white teller who had no prior supervisory experience although she had previous banking experience was selected for the promotion. Cullar had worked at Fort Worth Bank & Trust for two years at the time she was promoted to the supervisory position in February of 1980. (J.A. 192).

In order to assist Richard Burt as lobby teller, the Bank selected Clara Watson. (J.A. 14-16, 107-09, 122-23). The move did not involve a change in pay or title. She performed these duties for one year when in February of 1981, Richard Burt was again promoted, thus opening up the position of lobby supervisor. (J.A. 18). Clara Watson again applied together with Pat Cullar (a white female), Sylvia Harden (a black female), Kevin

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[6] After the court had certified this matter as a class action, the Bank advanced a black, Sylvia Harden, to the position of assistant to the motor bank supervisor, but her duties did not include evaluations of other employees. The Bank considered evaluation, hiring and firing duties as the prerequisites to the title of supervisor. (J.A. 50-53, 107-09, 122-23).

[7] Burt, who had been employed at the Bank since 1976, had been broken in as a teller by Clara Watson in the motor bank and then advanced to an assistant supervisor and then supervisor of the bookkeeping operation of the Bank. Prior to his employment by the Bank, Burt had no previous banking or supervisory experience, having worked only a few part-time jobs since his graduation from high school. (J.A. 13-16, 40-41, 115, 133-34).

Brown (a white male), and Donna Love (a white female). The Bank selected Cullar, the motor bank supervisor. (J.A. 18-19, 122, 130-37). This of course opened up the motor bank supervisor position and once again Watson, Harden and Brown applied for that position. (J.A. 18-19, 112-15, 122). The Bank chose Kevin Brown. (J.A. 18-19, 130-37). Brown had been an employee of the Bank for a little over a year, six months of that time as a part-time teller in the motor bank. A recent high school graduate, he was twenty-years old and had no prior banking experience. (Pl. Ex. 4, R. I 28-29). His work experience consisted of seven months as a salesperson in a department store and four years seasonal work as a cashier at Six Flags Over Texas Amusement Park which included some work supervising teenage seasonal employees. (J.A. 193).

Having been denied this fourth promotion, Clara Watson filed a charge with the Equal Employment Opportunity Commission which resulted in this lawsuit.

The Bank vested the discretion in its all white supervisory and management personnel to make hiring and promotional decisions based on purely subjective considerations. The Bank's hiring, promotional and salary procedures were described by Gary Shipp, senior vice-president of the Bank in charge of personnel. Shipp testified that hiring decisions are made by departmental supervisors who submit their decisions to Shipp for formal approval. (J.A. 64-65, 116-17, 119-21, 193). Shipp personally interviews some of the applicants but makes final hiring decisions only for those persons who would be working directly under his supervision. (J.A. 64-65, 116-17, 119-21, 194). During all periods relevant to the case, Shipp had final authority over all personnel matters. (J.A. 116-17, 119-21, 194). Applications were accepted from the usual sources including walk-ins, newspaper ads and the Texas Employment Commission. (J.A. 142, 147, 149).

Although standard application forms were used by the Bank which did not contain the race or sex of the applicants, the applications were coded by Mr. Shipp's secretary after the applicant had been interviewed to indicate each applicant's race

and sex. (J.A. 124). This information was obtained, according to Mr. Shipp, in order to fill out the job applicant flow log, and "so we'll know". (J.A. 124).

Performance evaluations are made by the supervisors for those employees under their authority. (J.A. 52-62, 194-96). Since 1978, employees have been given yearly written evaluations which are completed by their supervisors on the anniversaries of the employees' hire dates. Salary increases are then calculated on the basis of the performance ratings. (J.A. 52-62, 125-29, 194-95). The salary review committee, which consists of the president or executive vice-president of the Bank, the officer in charge of personnel and the senior operations officer,[8] reviews the evaluations of the supervisors. Only occasionally is a change made in a supervisor's rating. (J.A. 58, 66-75, 125-29, 195). Gary Shipp was a member of the salary review committee during the entire period relevant to the case. (J.A. 195).

While salary evaluations did involve the use of a salary evaluation form and a rating system, hiring decisions were left to the discretion of the supervisor, except for basic skills such as typing that might be needed for a particular position. (J.A. 121-22).

Promotions were handled in a similar fashion. Prior to 1979 job openings were not posted. (J.A. 121). Beginning in 1979, however, the Bank adopted a posting procedure as well as a preference for hiring from within the Bank before seeking outside applicants for other than entry-level positions. (J.A. 121). The posting would remain open for three days during which time the supervisor responsible for the position would accept applications for the position. The supervisor would then make the promotional decision and submit it to Shipp for formal approval. (J.A. 120-22). Shipp always approved the supervisor's choice. (J.A. 131-33, 156, 158, 161-62, 195).

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[8] Shipp was the senior operations officer during the time period considered in the statistical studies, and the personnel officer until September, 1983.

The criteria by which a person was judged suitable for hiring or promotion were left solely to the discretion of the supervisor in charge of making the decision, and the personnel officer. (J.A. 131-35, 139-40, 156, 161-62). There was no formal or even informal procedure for rating candidates for particular positions. (J.A. 135, 139-40). The criteria for promotion were described by Bank supervisors Richard Burt (Burt was the supervisor who made three of the decisions not to promote Watson), as follows:[9]

> Question (By Mr. Brender): . . . But you mentioned experience, leadership, previous supervisory experience and ability to get along with others?
>
> Answer (By Mr. Burt): Those are the things that come to my mind. But in any decision like that, there's maybe fifty or a hundred things that really enter into it. (J.A. 135).

When pressed by the Court to determine whether or not complaints about Clara Watson's performance had entered into his decisions not to promote her, Burt reiterated his description of the discretionary process as follows:

> Answer (by Mr. Burt): I think that's a factor. I wouldn't say that that was the determining factor, but it is—you know, there is a lot of things that go into making a decision and that would be one of them. (J.A. 141).

At trial Watson presented anecdotal and statistical evidence as to the adverse treatment she received as well as upon her claim that the wholly discretionary decisionmaking process impacted adversely on blacks as a whole. Watson's attempt to show pretext was frustrated by the shifting use of vague and subjective criteria in the selection process.

The Bank had advanced Burt to lobby supervisor in 1980 based, at least in part, on his supervisory experience gained at the Bank.[10] (J.A. 111-15). The Bank then promoted Cullar to

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[9] This quoted exchange occurred when Burt was cross-examined concerning the reasons for his decision to promote Kevin Brown over Clara Watson for the motor bank supervisor position in February of 1981.

[10] Burt had had no supervisory or banking experience before his employment with the Bank.

motor bank supervisor, over Watson, in part because Cullar had greater banking experience than Watson, despite the fact that Cullar had only been at the Bank approximately two years and like the Petitioner, had no supervisory experience. (J.A. 108-22). In February, 1981 the Bank promoted Brown over Watson because, while he had far less banking experience than Watson, he had prior supervisory experience. In all of these promotion decisions "numerous other factors" were also included. In each instance, the Petitioner was faced with the same vague standards in her attempt to show pretext for her individualized claim. (J.A. 108-22). Rebutting the claim that she did not get along with employees, Watson showed that one such employee used as an example by the Bank, Lena Gray, had had problems with numerous people at the Bank, including Cullar and Burt, and ultimately resigned. In addition Watson showed that Cullar had received a rating of three out of a possible nine in the supervisor/co-worker relationship category on her last annual evaluation prior to being promoted, while Watson was given a six in the same category. (R. III 92; Shipp Deposition, pp. 49-50; Class Certification Hearing Transcript, p. 85).

Watson rebutted the Bank's claim that Brown's prior supervisory experience was a factor by pointing to her own supervisory experience as Burt's assistant and her eight years overall banking experience, and by observing that Burt, Hazel Cretsinger and Joy Chandler (all white) had all been promoted to supervisor positions without prior supervisory experience. (J.A. 114-15). To demonstrate her own leadership ability, Watson testified to her alertness in apprehending two muggers who had attacked an elderly lady, had stolen her social security check and were thwarted by Watson in their attempt to cash the check.[11]

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[11] Watson sensed something was wrong when the two persons (one male and one female) presented the stolen social security check at the motor bank window. When she insisted on more identification, the pair sped from the drive-in window and Watson pursued and obtained the license plate number of their car. Watson was the only witness able to identify the pair. She testified at their trials and both were

Finally, Watson showed that Brown was poorly suited for his job. His employment evaluation completed, six months after his promotion, by Cullar found his performance only "close to being competent." (Pl. Ex. 4, R. I 29). His letter of resignation in December of 1981 questioned whether poor communication with the supervisor, inadequate training or his personality had caused him to last only ten months on the job. (Pl. Ex. 4, R. I 2963). The District Court found that the Bank had legitimate nondiscriminatory reasons for its promotions and denied Watson's disparate treatment claims.[12]

Thus Clara Watson turned to impact analysis in order to show that this subjective system with its fifty to one hundred different criteria that went into the decisionmaking process adversely impacted upon blacks, such as herself, subjected to such selection procedures. Since the employee selection procedures involved discretionary subjective evaluations by supervisors in both hiring and promotion, statistical studies of

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convicted and sent to the penitentiary. Watson was harassed by the family and friends of the muggers who lived a few blocks from her residence. She was pursued on one occasion by the thieves' friends and her yard was burned. (R. I 108-09).

[12] The District Court incorrectly found Brown "was available immediately" to assume the supervisory position while Watson was out on sick leave in 1981 and subsequently underwent foot surgery. (J.A. 197). Actually, that conclusion was not so. As the Fifth Circuit correctly determined, the Bank did not advance Watson's medical problems as a reason to prefer Brown over Watson. Watson had injured her foot while working at the Bank. (J.A. 23). At the time the promotion occurred, Watson's medical condition was such that she could still not stand for eight hours and carry bags of coins, etc., as the teller's job required, but she could have assumed duties as a supervisor which would not have been as strenuous. Although, at the time of the promotion decision, Watson's condition appeared as though it would heal quickly, her condition worsened in subsequent weeks, necessitating surgery in the spring of 1981. (R. I 58-59, 72-74, 186-87).

both were done.[13] The Petitioner presented Dr. Tom Marshall, a political science professor at the University of Texas at Arlington, who taught both undergraduate and graduate statistical courses. Both sides agreed to a statistical data base so that no question was raised about the authenticity of the data entered in the data base. Included in the data base were the name, position, salary grade, salary, education and experience levels of each person who had been employed at the Bank during the period covered by the class from October 21, 1979 through March 1, 1984. The Respondent presented no statistical study but did have Mr. Shipp testify about some of his opinions concerning what the data base reflected.

Clara Watson's analysis of hiring statistics indicated that over the four-year period covered by the class five hundred thirty-three (533) whites and one hundred forty-four (144) blacks applied for employment at the Bank. Seventy-nine (79) whites and five (5) blacks were hired. The hiring rate for blacks was 3.5 percent over the four-year period while the hiring rate for whites was 14.8 percent, both figures being statistically significant, using the chi-square test, at 0.001. (J.A. 76-81, 255). The Bank's position that only two weeks' worth of applications were actually considered for employment, while shown to be in error,[14] was nevertheless analyzed. Analyzing the Bank's position,[15] Watson's statistical test showed that the black rate of hire would be 8 percent and the white rate of hire 28 percent.

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[13] Since this case proceeded as a class action and the Petitioner was originally certified as a class representative of a broader class, salary discrimination studies were also performed.

[14] Several hirees, including Shipp's secretary, had applications submitted well in advance of the two week cut-off. The two week cut-off was not mentioned in deposition or at the Class Certification Hearing, and was first brought up in the trial on the merits. R. II 57-66; J.A. 119-20).

[15] That is, analyzing only applicants who had filed their applications within the two weeks before the Bank actually hired someone to the position.

Under the chi-square test these rates were significant at the 0.01 level. (J.A. 85-88, 280).

Although annual evaluations were in themselves determinative of salary increases, they also entered into at least to some extent the promotion decision. (R. III 50). Thus, the evaluations for each and every person represented in the statistical sample (the statistical sample included only nonexempt positions, and these did not include any officers) were examined to determine whether or not blacks were being evaluated at a lower rate than whites. The Bank had instituted annual evaluations on the anniversary date of each employee, at which time the employee's supervisor filled out a performance evaluation form, evaluating the employee on a scale that ranged from 0 to 7, to 0 to 10, depending upon the characteristic being rated. (Pl. Ex. 1-4, R. I 29, 63). The total points available were one hundred four. Progressively increasing annual salary increases would be given depending upon the performance evaluation rating. A rating of from fifty-three to sixty-two would merit a 6 percent increase whereas a rating from ninety-eight to one hundred four would merit an 11 percent increase. *Id.* Professor Marshall examined every evaluation of every employee at the Bank during this four-year period. His study revealed that whites had an average evaluation score of better than ten points higher than blacks. (J.A. 91-92, 273). Each of the evaluation studies was statistically significant at levels ranging from 0.05 to 0.001. *Id.*

Since nonexempt employees were placed in salary grades according to the jobs they were performing, an average increase in grade evidenced the promotion rate of blacks and whites. (J.A. 95-96, 98). Dr. Marshall's studies showed that whites increased in grade at an average of 0.53 grades per year while blacks increased 0.18 grades per year. (J.A. 96, 276). Over the four-year period encompassed by the study, blacks were a full 1.16 grades below whites. (J.A. 97, 276).

Realizing that averages can be deceptive where education and experience levels differ, Dr. Marshall performed a multiple regression analysis on the average increase in grade and on the

final grade achieved controlling for education and experience. Dr. Marshall's regression study included employee evaluations, although this inclusion would greatly assist the Bank since evaluations were lower for blacks by a statistically significant ten points per evaluation. (J.A. 98-103). Regression analysis showed that, controlling for education and the entry grade into which a person was originally placed when hired, race was a statistically significant factor, whites advancing at a rate 0.6 grades per year faster than their black counterparts. (J.A. 98-100, 277). The significance of this regression is that blacks hired by the Bank were on the whole better educated and had more experience than their white counterparts. Looking only at the averages, Petitioner's study (J.A. 95-96, 276) indicated blacks were disadvantaged by 0.35 grades per year, but when taking into consideration their education and original assignment, their detriment was almost twice as great. (J.A. 98-100, 277). Computing a similar regression for the final grade achieved by blacks at the Bank and controlling for, alternately, and then in combination, education, experience, and evaluations, blacks were again found to be from 1.22 to 1.38 grades lower than their white counterparts. (J.A. 100-03, 277). Each of the above figures was statistically significant at the 0.001 level. *Id.* Not surprisingly, Dr. Marshall's multiple regression studies of compensation at the Bank exhibited a similar racial bias which was also statistically significant. (J.A. 103-04, 277).

Dr. Marshall summed up the result of his individual studies when looked at collectively, stating:

> . . . [T]hey are race-related differences, most of them significant in all of those variables, both in the hiring part and in the treatment of present employees. . . . You get a consistent pattern of race related differences, depending on how many people you have and what the—the number of characteristics you are talking about. Sometimes it is stronger than others, but it is very, very consistent in one particular direction; yes, sir. (J.A. 104-05).

Watson's statistical studies buttressed her anecdotal evidence concerning the effect on herself and other blacks of the Bank's entirely subjective decisionmaking processes. The

same white supervisors who hire only 3.5 percent of the black applicants while hiring 14.8 percent of the white applicants, rate blacks ten points lower than whites on the average on annual salary evaluations, and promote blacks from one salary grade to another at a slower rate (-0.6 salary grades per year) as compared to their white counterparts. Over a four-year period blacks are better than one and one-third (1.38) salary grades below their similarly qualified white counterparts. (J.A. 72-73, 77-78, 91-92, 98-103, 107-08, 161, 194-95, 255, 273, 274). Nevertheless, the promotion criteria comprised fifty or one hundred factors which included no standards, instructions, or formal rating procedures. (J.A. 134-35, 161).

When confronted with Petitioner's statistical study, vice-president Shipp acknowledged his previous observations that blacks appear to perform as well as their white counterparts in the Bank. (J.A. 176). When asked to explain why blacks had lower average evaluations, Shipp could not explain this disparity:

> Question: (By Mr. Brender) Can you explain why blacks have lower average evaluations than whites do?
>
> Answer: (By Mr. Shipp) Can I explain why? No, I can't. (J.A. 175).

When further confronted with white hiring rates that were three times that of blacks, Mr. Shipp attributed the adverse impact to some quirk in record keeping. (J.A. 176-77).

The Petitioner, in the Pretrial Order, her Post Trial Brief, and her Motion for New Trial and for Additional Findings of Fact, requested that the Court review the evidence under the disparate impact model. (R. 283, 320, 409) The District Court refused to do so. The Court of Appeals, following *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982), held that disparate impact analysis was not applicable. 798 F.2d at 797. Clara Watson duly perfected her petition for writ of certiorari from this Court to review that decision.

SUMMARY OF ARGUMENT

This Court's decision in *Griggs* v. *Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), did not restrict

disparate impact analysis to objective tests. The legislative history and the congressional choice not to so restrict disparate impact analysis with the adoption of the 1972 amendments to Title VII, 42 U.S.C. secs. 2000e et seq., clearly demonstrated the congressional resolve to combat discriminatory effects whether they be from subjective or objective procedures. Legislative history of the 1972 amendments demonstrates Congress' adoption of then current case law and EEOC Guidelines that had unmistakably subjected all elements, objective and subjective, of the total employee selection process to disparate impact analysis. The EEOC Guidelines, which the *Griggs* Court held were entitled to great deference, define the selection procedure subject to a disparate impact analysis to include "the full range of assessment techniques . . . from traditional paper and pencil tests, performance tests, training programs . . . through informal or casual interviews and unscored application forms." U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295, 38308 (1978) (codified at 29 C.F.R. sec. 1607.16(Q). To deny the Petitioner and others the right to test subjective decisionmaking procedures by the disparate impact model will penalize employers who have conscientiously adopted objective job-related practices and encourage employers to resort to subjective selection practices which more readily lend themselves to violations of Title VII. Unlawful discrimination embedded in subjective decisionmaking processes may be impossible to prove under the alternate *McDonnell Douglas* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) test because covert discrimination may then be hidden among dozens of possible considerations, all facially neutral, and far too numerous to possibly rebut. To permit a subjective but discriminatory employee selection system to remain in effect, shielded from disparate impact analysis, but not susceptible to proof of intentional discrimination, would create an ad hoc discriminatory quota system contrary to the clear purpose of Title VII to eliminate the effects of racial discrimination in the workplace. Finally, to require an employer to validate a subjective selection process would not

unduly burden the employer, in light of the Petitioner's initial and heavier burden of demonstrating a statistically significant disparate impact and the logic requiring the employer, with its greater knowledge of the whys and wherefores of its practices, to produce justification for their continued use.

ARGUMENT

The Petitioner, Clara Watson, clearly showed that there existed at Fort Worth Bank & Trust, during her tenure with the Bank, a selection system, both for hiring and promotion, which consisted purely of white supervisors whose hiring, promotion, and salary decisions were wholly discretionary and (with the exception of salary evaluations) were not guided by any criteria whatsoever. The total selection process resulted in no black ever advancing to the rank of supervisor, much less officer, of the Bank. Despite the fact that the Bank was located very close to Fort Worth's two main black population concentrations and approximately one-half of the Bank's customers were black, only five (5) of the one hundred forty-four (144) blacks who applied for employment were hired during the four-year period examined by the Petitioner in her statistical study. During that same period, seventy-nine (79) out of five hundred thirty-three (533) white applicants were hired. The 3.5 percent hiring rate for blacks was less than one-third of the 14.8 percent hiring rate for whites. Annual evaluations of non-officer personnel showed that blacks, on their first performance evaluations, averaged a score of sixty-three (63), while the average score for whites was seventy-eight (78). The second, third and fourth year evaluations yielded similar results, all of them statistically significant. Blacks progressed an average of .18 of a salary grade per year as opposed to .53 of a grade for whites, and when multiple regression analysis took into consideration educational background and prior banking experience, blacks were found to progress .6 of a grade per year more slowly than whites. Taking into consideration education, experience and even the flawed evaluation scores, blacks, at the end of the four-year period, were an average 1.38 salary grades behind their white counterparts. Multiple regression analyses of salary,

controlling for the same variables, indicated the final salary of blacks, at the end of the period, fell forty-five dollars and ninety-eight cents ($45.98) a month below what was paid their white counterparts.

The Respondent presented no statistical expert at trial, performed no analysis on the hiring statistics or promotion statistics, and only weakly attempted to question the Petitioner's salary statistics. Presenting no statistical expert, the senior vice-president and personnel officer for the Bank, Gary Shipp, pointed out some of the characteristics of the salary figures earned by personnel at the Bank without preparing or presenting any calculations or mathematical conclusions from the evidence. Nevertheless, both the District Court and the Court of Appeals refused to consider the Petitioner's case under the disparate impact model, the Court of Appeals citing its decision in *Pouncy* v. *Prudential Insurance Company*, 668 F.2d 795 (5th Cir. 1982), which prohibited the use of the disparate impact model of proof of employment discrimination under Title VII where the employee selection procedure is a subjective one. The Petitioner submits that this is not a proper interpretation of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e et seq.

1. *GRIGGS* AND ITS PROGENY DO *NOT* RESTRICT DISPARATE IMPACT ANALYSIS TO OBJECTIVE SELECTION PROCEDURES.

Griggs v. *Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) and its progeny do not restrict disparate impact analysis to objective employee selection procedures.

Chief Justice Burger, writing for a unanimous Court in *Griggs*, announced what was the seminal interpretation of the monumental and far reaching statutory extension of equal protection into the private work place, Title VII of the 1964 Civil Rights Act, 42 U.S.C. secs. 2003 et. seq., It is appropriate that *Griggs* dealt with the effects of discriminatory practices. As the Court pointed out:

> The object of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 429-30.

When Chief Justice Burger wrote for the Court in *Griggs*, Title VII was but seven years old and the national debate and sometimes violent confrontations that preceded the enactment of the statute were no doubt still fresh in the minds of each Justice. No mention of intent was made in any version of the bill nor in the version that passed, Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443 (1986), and while the Chamber of Commerce in an amicus brief filed before this Court in *Griggs* argued for an intent standard to be applied,[16] the Solicitor General of the United States, in a position curiously different from that taken by the present Solicitor General,[17] argued in his Brief then submitted on behalf of the United States:

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[16] Brief of the Chamber of Commerce of the United States as Amicus Curiae at 7-9, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *cited in* Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443, 446-447 (1986).

[17] *See* Brief of the United States as Amicus Curiae on Petition for a Writ of Certiorari at 9, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139):

> When Congress enacted Title VII in 1964, it made clear that employers could no longer intentionally select among applicants and employees on the basis of race, sex, or certain other enumerated criteria (42 U.S.C. 2000e-2(a)(1)). Less clear, however, was whether employers could, in good faith, and without the intent to discriminate, continue to use standardized tests and other mechanical devices for selecting among competing applicants and employees when the effect of using such devices is adverse to persons in one or more of the enumerated groups.

> For the congressional purpose in enacting Title VII was—as its heading "Equal Employment Opportunities" suggests—to accomplish economic results, not merely to influence motives or feelings. Discretionary "employment practices"—not attitudes—are declared unlawful.

Brief for the United States as Amicus Curiae at 15-16, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The former Solicitor General was certainly more in tune with the legislative history of the Act and this Court's firm adherence to the principles of *Griggs*. In *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 n.7, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), Chief Justice Burger, again writing for the majority, interpreted Section 703(a)(1) of the Act by tracing its legislative history to S. Rep. No. 867, 88th Cong., 2d Sess. (1964). The Report states:

> Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures operate together with widespread built-in administrative processes through which non-white applicants are automatically excluded from job opportunities.

Id. at 5.

Subsequent case law has reaffirmed the Court's adherence to *Griggs*[18] and commentators have hailed the *Griggs* decision as a "successful social revolution."

> Under the impact of *Griggs*, employers discovered that many standards they thought necessary to find qualified employees were not in fact required. Once liberated from their attachment to non-job related criteria, they were able to increase dramatically their employment of minor-

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[18] Albemarle Paper Company v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, (1977); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); and *Connecticut* v. *Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

> ities and women. This performance is one of the great successful social revolutions of this, or any, era.

Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443, 450-51 (1986); *see also* Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 5 Indus. Rel. L.J. 313 (1984).

The exception to the effect analysis set up under *Griggs* is a more narrowly tailored disparate treatment analysis formulated by the Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and refined in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Justice Powell, writing for the Court in *McDonnell Douglas* found "the critical issue" before the Court "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. Noting that the two opinions of the Court of Appeals had attempted "with notable lack of harmony" to state the applicable rules of proof, Justice Powell proceeded to address the problem. 411 U.S. at 801. The problem that the courts had had with cases such as *McDonnell Douglas* was that such cases simply did not fit the *Griggs* model because there was simply no evidence of systematic exclusion of persons in the protected class, but nevertheless, individuals were subjected to individual acts of discrimination for which they should be able to seek redress under the statute. The Court set out the formula for making such a proof (later refined in *Burdine)* and distinguished the case from *Griggs* as follows:

> And Petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected Respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary and unnecessary

> barriers to employment" which the Court found to be the intention of Congress to remove.

411 U.S. at 806.

Thus the model of discrimination that focuses not upon a practice, but necessarily upon an individual act, which came later to be known as disparate treatment, is the exception rather than the rule in the fight to end racial injustice. A proper order of proof, when presented with facts evidencing differing treatment for minorities or women, is to measure the impact of the practice and if sufficiently disparate under the *Griggs* test, then to proceed with the order of proof under that test. If there is no impact because there is no practice, because the employer's decision is an isolated, individual one, or because there is no evidence to suggest an impact sufficient to invoke *Griggs*, then and only then, should the Court proceed to analyze the case for individualized discrimination not part of a practice generally affecting those protected by the statute.

Certainly nothing in the language of the *Griggs* opinion evidences any intention of limiting the Court's consideration of disparate impact cases to those in which the selection practice is objective as opposed to subjective. In describing the congressional purpose underlying *Griggs*, the Court referred to "tests or criteria":

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox.

401 U.S. at 431.

In concluding its opinion, the Court noted:

> Nothing in the Act precludes the use of testing or measuring *procedures;* obviously they are useful. What Congress has forbidden is giving these *devices* and *mechanisms* controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins.

401 U.S. at 436 (emphasis added).

The Court relied on the Equal Employment Opportunity Commission, responsible for enforcement of the Act, for assistance in interpreting Section 703(h) of the Act:

> The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

401 U.S. at 433-34 (citations omitted).

The initial Guidelines on Employment Testing Procedures issued by the EEOC on August 24, 1966 make no distinction between objective and subjective selection procedures. The Commission advocated:

> . . . use of a *total personnel assessment system* that is nondiscriminatory within the spirit of the law . . .

U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures, at 3 (1966). The Commission advocated that screening and interviewing be job related and emphasized that such interviewing and testing of minority applicants should be conducted by personnel "familiar with EEO policy." The Guidelines go on to state "[t]he Commission views tests as only one component of the personnel system—no better or worse than the selection system of which they are a part." *Id.*

Prior to the Court's decision in *Griggs*, the EEOC formally adopted and published in the Federal Register its Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (1970) (then codified at 29 C.F.R. sec. 1607.1 et seq.). The Commission defined tests in section 1607.2 as follows:

> For the purpose of the Guidelines in this part, the term "test" is defined as any paper-and-pencil or *performance measure* [emphasis added] used as a basis for any employment decision. . . . The term "test" includes all formal, scored, qualified or standardized techniques of assessing job suitability including, in addition to the above, specific

qualifying or disqualifying personal history or background requirements, specific education or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

. . .

Sec. 1607.5 Minimum standards for validation

. . .

[(b)](4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. . . .

. . .

Sec. 1607.13 Other selection techniques

Selection techniques other than tests, as defined in sec. 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as any tests which may be used, the evidence of validity being the same types referred to in secs. 1607.4 and 1607.5.

U.S. Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12334, 12335, 12336 (1970).

Thus, the very guidelines to which this Court gave "great deference" clearly defined and included in the term "test" various subjective procedures such as scored interviews and rating scales, and further, required validation even of casual interviews, selection techniques other than tests which were clearly subjective. Both the 1966 Guidelines on Employment Testing Procedures and the 1970 Guidelines on Employee Selection Procedures clearly contemplated evaluation of the total selection process, clearly including both objective tests and other subjective practices.

Subsequent decisions of this Court have upheld both the logic of evaluating the total selection process and the lack of distinction between objective and subjective standards. The Solicitor General, in his amicus curiae brief on the question of certiorari, seems to argue that a discretionary or subjective decisionmaking process is, by its very nature, always deliberate and based upon intent and thus, should be measured only by disparate treatment analysis. Thus the Solicitor General, erroneously concludes that only one method of proof is applicable to any set of facts, citing *Hazelwood School District* v. United States, 433 U.S. 299 (1977), *Teamsters* v. *United States*, 431 U.S. 324 (1977) and *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973)—all of which involved some subjective decisionmaking processes to which, the Solicitor General argues:

> The Court has declined to extend the disparate impact doctrine beyond the non-discretionary devices and unique exclusionary problems that initially led to its adoption.

Brief of the United States as Amicus Curiae at 11, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139).

The Solicitor General's reasoning is specious. In *McDonnell Douglas Corporation* v. *Green*, there simply was no evidence of group-wide impact, as was pointed out earlier. *See McDonnell Douglas*, 411 U.S. at 806.

The *Hazelwood* facts are closer to those of *Watson*. In *Hazelwood*, teachers were referred to individual school principals who had practically unchecked discretion in hiring. But while the Court examined individual disparate treatment claims and found them lacking, the Court's discussion of the statistical showing necessary to make out a disparate impact case indicates Court approval rather than disapproval of the use of disparate impact analysis upon subjective criteria. In *Hazelwood*, the question was whether or not the Government's statistical evidence was sufficient to prove disparate impact in a pattern or practice case. 433 U.S. at 312. The Court remanded the case to the District Court to conduct further findings as to the relevant labor market area and thus to determine "whether

Hazelwood engaged in a pattern or practice of discrimination. . . ." 433 U.S. at 313.

In *Teamsters*, the Government never attempted to prove a disparate impact case, even though the selection procedure involved was apparently not a subjective one, but rather an objective collective bargaining agreement seniority system which "operated to impede the free transfer of minority groups into and within the company." 431 U.S. at 331. Footnote 15 of this Court's opinion, however, in explaining the difference between disparate treatment and disparate impact, noted that "either theory may, of course, be applied to a particular set of facts." 431 U.S. at 335 n.15.

Likewise, any reliance on *Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) for support for the Solicitor General's position is misplaced. In *Furnco*, the District Court and the Court of Appeals had concluded that *Furnco's* policy of not hiring at the gate was racially neutral on its face, but there was no showing that the policy had had a disparate impact or effect. 438 U.S. at 572. The Court of Appeals, while affirming the District Court's decision upon disparate impact, reversed as to disparate treatment and it was the treatment issue that reached and was decided by this Court. This Court's footnote 7, which has sometimes been relied upon for the proposition that disparate impact analysis may not be appropriate for subjective selection procedures, simply reiterated the disparate impact cases decided by the Court as of that date, and the Court elsewhere explained that since there was no evidence of disparate impact in the instant case, the *McDonnell Douglas* approach was sufficient. 438 U.S. at 572, 575.

The *Griggs* Court's emphasis on the EEOC guidelines certainly evidenced an intent to look at the whole selection process, and in *Connecticut* v. *Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), both the majority and the dissent agreed that the disparate impact approach includes examination of the entire range of employee selection devices. Justice Brennan, writing for the majority, held that:

> Relying on Section 703(a)(2), *Griggs* explicitly focused on employment "practices, procedures or tests" that deny equal employment "opportunity."

457 U.S. at 448 (citations omitted). While disagreeing with the majority's resolution of the case, Justice Powell wrote for the dissent, which included Justice Rehnquist, the author of *Furnco:*

> In keeping with this distinction, our disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group. If this case were decided by reference to the total process—as our cases suggest that it should be—the result would be clear.

457 U.S. at 458 (emphasis in original).

Both opinions in *Teal* footnoted the Uniform Guidelines on Employee Selection Procedures, promulgated by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor's Office of Federal Contract Compliance Programs, and the Department of Justice. These Uniform Guidelines make explicitly clear that the total selection process which is subject to impact analysis includes subjective as well as objective selection procedures. *See* U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. sec. 1607.16(Q) (1987).

This Court's post-*Griggs* opinions simply cannot be explained by the "subjective is always intentional" rationale advanced by the Solicitor General. The Court's occasional resort to analysis of disparate treatment is better explained by Justice Powell's dissent in *Connecticut* v. *Teal:*

> There can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group.*

457 U.S. at 459 (emphasis in original).

The Ninth Circuit *en banc*, in *Atonio* v. *Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987), persuasively disposed of the Solicitor General's subjective intent argument:

> Defendants argue that there is a logical basis for a distinction between objective and subjective practices and for the correlative categorization of the analysis of the proof of impermissible discrimination. In their view, subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus. They argue that only objective practices can be evaluated for disparate impact.
>
> We disagree. Subjective practices may well be a covert means to effectuate intentional discrimination, as the Defendants point out, but they can also be engendered by a totally benign purpose, or carried on as a matter of routine adherence to past practices whose original purposes are undiscoverable. Subjective practices are as likely to be neutral in intent as objective ones. If, in fact, the subjective practices are a "covert means" to discriminate intentionally, by definition intent will be difficult to prove. If the practices are the cause of adverse impact, the purposes of Title VII are well served by advancing proof of adverse impact, thereby obviating the necessity of proving intent. Proof of intent where adverse impact can be shown may be not only unnecessary but undesirable because of the animus the process generates.

810 F.2d at 1484.

Clara Watson's case provides an excellent example of the Ninth Circuit's logic. When Watson applied for promotion in 1980, Pat Cullar was selected over Watson by her white supervisor, and given as one reason (although there could have been fifty or a hundred different factors, *see* Burt testimony concerning selection process, (J.A. 132, 134-35, 141) was that Pat Cullar had had more overall banking experience, though she had had five years less experience at Fort Worth Bank & Trust than had Clara Watson. One year later when Kevin Brown, another white was selected over Clara Watson for the motor bank supervisory position, one of the fifty or hundred considerations that went into the subjective decision by her supervisor to choose Brown over Watson was that Brown had had some prior supervisory experience before coming to the Bank—but the supervisor admitted that Brown had had only one year on the job, compared to Watson's then seven years. While the

District Court was "troubled" particularly by the latter decision and the inconsistency in the use of criteria in the decision-making process, the Court was loath to label it "intentional discrimination"—obviously, because the criteria involved and the process were facially neutral and might, if properly evaluated, prove a perfectly valid basis for an employment decision. When Gary Shipp, vice-president and personnel officer for the Bank, was confronted with evidence of the statistically significant disparity between white and black salary evaluations, he was simply unable to explain how that could have happened. (J.A. 175-76). When he was confronted with the fact that 3.5 percent of blacks were hired, and 14.8 percent of whites, once again, an overwhelming statistical racial disparity, Mr. Shipp could only respond that there must be some problem with the statistics. (J.A. 176-77). Was Mr. Shipp pursuing a covert means to effectuate an intentional discrimination? Or was he simply adhering to past personnel practices whose purposes were racially benign, but whose sloppy methods and unsubstantiated criteria permitted racial bias to be carried out unwittingly through the Bank's selection procedures? The Report of the United States Senate previously discussed, S. Rep. No. 867, portended the Ninth Circuit's reasoning in *Atonio:* "Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail through the major part of the white economic community." The distinction between subjective and objective selection criteria is an artificial and pointless distinction never intended by Congress or this Court.

II. THE LEGISLATIVE HISTORY, AND CONGRESSIONAL INACTION UPON DISPARATE IMPACT WITH THE ADOPTION OF THE 1972 AMENDMENTS TO TITLE VII, EVIDENCE CONGRESSIONAL APPROVAL OF THE DISPARATE IMPACT APPROACH.

Justice Brennan, writing for the majority in *Connecticut* v. *Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), unequivocally relied upon the congressional intent to adopt disparate impact analysis when the Congress extended the

protections of Title VII to state and municipal employees in 1972:

> The 1972 amendments to Title VII do reflect Congress' intent to provide state and municipal employees with the protection that Title VII, as interpreted by *Griggs*, had provided to employees in the private sector: equality of opportunity in the elimination of racial barriers to professional development.

457 U.S. at 449.

The *Griggs* protection extended to subjective as well as objective employee selection devices:

> Congress voiced its concern about the widespread use by state and governmental agencies of "invalid selection techniques" that had a discriminatory impact. S. Rep. No. 92-415. . . .

Teal, 457 U.S. at 449.[19]

Senator Harrison Williams, a principal sponsor of the Senate bill that was ultimately enacted, expressly relied upon a United States Commission on Civil Rights report which was placed in the Congressional Record. That report demonstrates the Congress' awareness, in 1972, of the need to apply disparate impact analysis to subjective criteria.

> Two of the three barriers cited were "recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities," and promotions made on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." U.S. Commission on Civil Rights, For All the People . . . By All the People—A Report on Equal Employment Opportunities in State and Local Government Employment, 1190 (1969), reprinted in 118 Cong. Rec. 1817 (1972).

Teal, 457 U.S. at 450.[20]

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[19] *Teal* relies upon the committee reports in both houses.

[20] For an exhaustive study of the legislative history of the 1972 amendments, *see* Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 Indus. Rel. L.J. 105 (1986).

The House report which accompanied the House version of the bill (H.R. 1746) truly evidences the intent of Congress not only to adopt the doctrine of adverse impact but to test subjective as well as objective selection devices against it. In discussing the legislative history of the bill, the report describes the congressional view of the employment environment:

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and of "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing validation requirements.[2] The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. . . . A recent striking example was provided by the United States Supreme Court in its decision in *Griggs* v. *Duke Power Company*. . . .
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> [2]*See, e.g.*, . . . Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 32 Harv. L. Rev. 1623 (1969). . . . *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d. 1047 (C.A. 5 1969). . . .
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> . . . .
>
> The provisions of the bill are fully in accord with the decisions of the courts and with the testing guidelines established by the Commission. . . .

H.R. Rep. No. 238, 92nd Cong., 2nd Sess., *reprinted in* 1972 U.S. Code Cong. and Admin. News, 2137, 2144, 2157.

The Cooper and Sobel article, comprehensively cited with approval in the House Report, discussed seniority and testing issues, including the application of disparate impact analysis to subjective criteria: "If any subjective procedure has a systematic effect in disadvantaging blacks, the employer should be required to show the same justification as for a test or other objective procedure." 82 Harv. L. Rev. at 1677. *Vogler*, an early

Fifth Circuit opinion cited approvingly in the House Report, struck down subjective union membership rules for their disparate impact violative of Title VII.

The report of the conference committee on the 1972 amendments to Title VII, clearly expressed Congress' desire that the then current case law of the Title would continue to govern:

> In any area where the new law does not address itself or any area where a specific contrary intention is not indicated, it was assumed that present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, H.R. Conf. Rep., 92nd Cong., 2nd Sess., *reprinted in* 118 Cong. Rec. 7166 (1972).

Plainly, the Congress was aware of and deliberately approved the literature, case law, and EEOC Guidelines and decisions that had interpreted Title VII to test all employee selection practices, whether objective or subjective, for their disparate impact.

III. BOTH THE GUIDELINES AND DECISIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAVE CONSISTENTLY HELD THAT SUBJECTIVE EMPLOYEE SELECTION PROCEDURES SHOULD BE TESTED FOR DISPARATE IMPACT.

The EEOC's interpretations of Title VII are entitled to great deference. *Griggs* v. *Duke Power Company*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *McDonald* v. *Santa Fe Trial Transp. Company*, 427 U.S. 273, 278, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). This Court has afforded particular weight to administrative regulations that have been consistently interpreted and administered without change or legislative interference. In discussing the incorporation of the disparate impact test of discrimination in Title VI of the 1964 Civil Rights Act, for instance, this Court recognized the cooperation of seven agencies in drafting the regulations at issue

and noted that "the Title, furthermore, had been consistently administered in this manner for almost two decades without interference by Congress." *Guardians Assn.* v. *Civil Serv. Comm'n N.Y.C.*, 463 U.S. 582 at 592-93, 100 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (White, J.). Hence, an enforcing agency's interpretation of a statute may be confirmed or ratified by congressional inaction. *Haig* v. *Agee*, 453 U.S. 280, 291-300, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

The first part of this brief has shown the Commission's consistent advocacy, since its first published Guidelines, of the use of a "total personnel assessment system."[21]

Following the early 1966 Guidelines with a more comprehensive treatment, in 1970 the Commission, in published Guidelines on Employee Selection Procedures, defined "test" to include paper and pencil examinations as well as "performance measure[s] used as a basis for any employment decision."[22] "Tests" included personal history or background requirements, education or work history requirements, scored interviews, biographical information, scored application forms, and interview rating scales.[23] The regulations recognized and warned against the bias inherent in subjective evaluations of performance which an employer might use in an attempt to validate a test,[24] and required the employer to validate these evaluations and all other subjective selection techniques:

> Selection techniques other than tests, as defined in section 1607.2 may be improperly used so as to have the *effect* [emphasis added] of discriminating against minority

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[21] U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures, at 3 (1966).

[22] U.S. Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12334 (1970) (then codified at 29 C.F.R. sec. 1607.2).

[23] *Id.*

[24] *Id.* at sec. 1607.5.

> groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as any tests which may be used, the evidence of validity being of the same types referred to in sections 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs.[25]

The Commission re-issued these regulations, intact, in 1976.[26]

In 1978, the Equal Employment Opportunity Commission joined the Civil Service Commission, the Office of Federal Contract Compliance Programs in the Department of Labor, Department of the Office of Revenue Sharing in the Treasury, and the Department of Justice to adopt and publish Uniform Guidelines on Employee Selection Procedures. The Uniform Guidelines became part of the official regulations of the EEOC, at 29 C.F.R. 1607.1, et. seq. These Uniform Guidelines purposed to assist employers, labor organizations and others to understand and properly apply federal law prohibiting employment practices which discriminate by race, color, religion, sex, or national origin.[27] The comprehensive regulations once again tested such selection procedures for disparate impact, and insisted that selection procedures having a disparate impact be validated for job-relatedness. Consistent with the EEOC's

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[25] *Id.* at sec. 1607.13.

[26] U.S. Equal Employment Opportunity Commission, Guidelines of Employee Selection Procedures, 41 Fed. Reg. 51984 (1976) (then codified at 29 C.F.R. sec. 1607.1 et seq.).

[27] U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978) (codified at 29 C.F.R. sec. 1607.1 et seq.).

position since it issued its first 1966 Guidelines, the term "selection procedure" was defined as follows:

> Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.[28]

Promulgated shortly after the Uniform Employee Selection Guidelines was a series of "Questions and Answers" which were designed jointly by the enforcing agencies to "clarify and interpret, but not to modify" the Uniform Guidelines.[29] This interpretation of the Guidelines leaves no doubt that subjective employment selection procedures are to be tested by disparate impact analysis. Question five asks if the Guidelines apply "only to written tests." The answer responds in the negative, stating they apply to "all selection procedures used to make employment decisions" including "interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance."[30] Question fourteen asks whether the "total selection process," with all its components, constitutes the initial basis upon which disparate impact should be measured. The agencies answer that the total selection process "refers to the combined effort of all selection procedures leading to the final employment decision such as hiring or promoting," including any applicant interview or "supervisor's interview."[31]

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[28] *Id.* at sec. 1607.16(Q).

[29] U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures: Interpretation and Clarification, 44 Fed. Reg. 11996 (1979).

[30] *Id.* at 11997.

[31] *Id.* at 11999.

The enforcing agencies have therefore consistently required examination of the adverse impact of the total selection process, a position consistent with this Court's disparate impact cases. *Connecticut* v. *Teal*, 457 U.S. at 458. This consistency and insistence upon examination of the impact of both objective and subjective components of employee selection procedures predated this Court's decision in *Griggs* and the 1972 congressional amendment of Title VII.

The EEOC, moreover, in its administrative decisions, has expressly interpreted these regulations to require disparate impact analysis of subjective decision making in hiring, promotions, and other employment practices. In EEOC Decision no. 72-1885, the Commission found a practice of leaving all promotion decisions, for which there were no fixed standards, to the judgment of foremen. That practice, which resulted in a statistical disparity of minorities in the work place established a prima facie case of unlawful, disparate impact. 1983 Empl. Prac. Dec. (CCH) par. 6385 (May 31, 1972). In EEOC Decision no. 73-0520, the Commission found that hiring, promotions and other employment decisions hinged not upon any objective guidelines, but upon subjective recommendations of a purely caucasian supervisory staff. That practice was shown to have a statistically disparate impact on blacks in the managerial, supervisorial, clerical and higher-paying production classifications in violation of Title VII. 1983 Empl. Prac. Dec. (CCH) par. 6389 (June 14, 1973). Indeed, EEOC Decision no. 77-14 found an employer's subjective recruitment practices facially neutral, and part of a hiring and promotion process which, together with a resulting statistical racial disparity, conclusively proved past and present discrimination. 1983 Empl. Prac. Dec. (CCH) par. 6567 (March 15, 1977).

The enforcing agencies' application to subjective employee selection procedures of disparate impact analysis, before and after *Griggs*, an application consistently administered for over two decades without congressional interference, like a similar agency's consistent application of disparate impact analysis to Title VI, compels the conclusion that Congress intended Title

VII to extend disparate impact analysis to subjective employee selection procedures. *Guardians Assn.* v. *Civil Serv. Comm'n N.Y.C.*

IV. THE EXPERIENCE OF THE DISTRICT COURTS AND THE COURTS OF APPEAL SUPPORTS THE NECESSITY OF APPLYING DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT SELECTION DEVICES.

The Court of Appeals for the Ninth Circuit sitting *en banc*, in a well-reasoned decision confirmed that Circuit's adoption of the disparate impact model in analyzing subjective employment selection procedures.[32] *Atonio* v. *Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987). The Ninth Circuit, in *Atonio*, examined all of the relevant policy considerations on the path to adopting this policy and in doing so, summed up the considerations generally advanced by the other circuits that have applied disparate impact analysis to subjective employment selection procedures. The Court found that there is no bright line distinction between objective and subjective hiring criteria and that the difference is particularly meaningless when the criteria impact on a protected class. 810 F.2d at 1485. Finding little logic to the claim (advanced here by the Solicitor General, together with the Respondent) that "subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus," the Court found little difference between a subjective practice as a covert means to effectuate an intentional discrimination and a subjective practice neutral in intent but carried on as a matter of routine adherence to past practices which effectuates the same discrimination. 810 F.2d at 1484. The Court considered that the congressional intent to provide employers with an

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[32] Logically, the Court, following *Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), found that both disparate treatment and disparate impact analysis can be used in order to resolve "the ultimate question, whether there has been impermissible discrimination by an employer." *Atonio*, 810 F.2d at 1480.

incentive to abide by Title VII guarantees, would be thwarted if the incentive to validate objective criteria was destroyed by allowing employers to switch to a purely discretionary hiring method. 810 F.2d at 1484. Finally the Court found that proving business necessity is no more onerous in a case involving subjective practices than in one involving objective practices because in either case, the employer is the person with the knowledge of what his practices are and how his employment practices affect employees. 810 F.2d at 1486. Although differing somewhat from case to case, the rationale and logic of the Ninth Circuit's *Atonio* opinion have been adopted by nine of the twelve Courts of Appeal.[33]

[33] First Circuit, *Robison* v. *Polaroid Corporation*, 732 F.2d 1010 (1st Cir. 1984) (layoff selection guidelines, including subjective evaluations of employees' knowledge, past performance and future potential, evaluated for disparate impact); Second Circuit, *Grant* v. *Bethlehem Steel Corporation*, 635 F.2d 1007 (2nd Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (disproportionate number of minorities advanced to foreman based on purely subjective determination of experience and standardless procedures); Third Circuit, *Wilmore* v. *City of Wilmington*, 699 F.2d 667 (3rd Cir. 1983) (fire department promotion system, incorporating subjective evaluations, found to have disparate impact); Sixth Circuit, *Rowe* v. *Cleveland Pneumatic Company, Numerical Control, Inc.*, 690 F.2d 88 (6th Cir. 1982) (unrestricted plant foreman discretion in rehire system); Seventh Circuit, *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977) (subjective requirement, including good character and moral conduct, held to adversely impact on minorities); Ninth Circuit, *Atonio* v. *Wards Cove Packing Company, Inc.*, *supra*; Tenth Circuit, *Lasso* v. *Woodman of World Life Ins. Co., Inc.*, 741 F.2d 1241 (10th Cir. 1984) (failure to promote to management position based on subjective criteria such as management experience, personality and leadership skills found to be subject to disparate impact treatment); Eleventh Circuit, *Griffin* v. *Carlin*, 755 F.2d 1516 (11th Cir. 1985) (disparate impact theory proper test of end result of multicomponent promotion process and of subjective elements of process); and District of Columbia Circuit, *Segar* v. *Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (disparate impact analysis proper to analyze subjective selection procedure evaluating DEA agents' tact, discretion, initiative, resourcefulness and ability to gain the cooporation and confidence of others).

Well-reasoned commentaries have supported the view of nine of the twelve circuits that subjective criteria are fully capable of being reviewed under the disparate impact model as a fair and workable measure by which to ensure equal employment opportunity.[34] The conclusion compelled by the case law and commentaries is that disparate impact analysis applied to subjective employment criteria is a practical and effective tool to carry out the goal of Title VII to eliminate discrimination in employment.

V. TO PROHIBIT SUBJECTIVE EMPLOYMENT SELECTION PROCEDURES FROM BEING REVIEWED FOR THEIR DISPARATE IMPACT TOWARD MINORITY EMPLOYEES AND APPLICANTS WILL ENCOURAGE EMPLOYERS TO ABANDON OBJECTIVE STANDARDS WITH THEIR INCUMBENT NECESSITY TO BE VALIDATED IN FAVOR OF WHOLLY DISCRETIONARY SUBJECTIVE STANDARDS WITH THEIR INHERENT POTENTIAL FOR DISCRIMINATION.

This Court has long recognized that highly subjective selection systems are highly susceptible to abuse and particularly so where racial considerations play a part. *Castaneda* v. *Partida*, 430 U.S. 482, 496-97, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).[35] It is no surprise that the EEOC in its Guidelines has long opposed subjective employment selection criteria because such criteria

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[34] Comment, *Applying Disparate Impact Theory to Subjective Employee Selection Procedures*, 20 Loy. L.A.L. Rev. 373 (1987); Comment, *Application of the Adverse Impact Analysis to Subjective Criteria in Title VII Employment Discrimination Cases*, 38 Baylor L. Rev. 363 (1986); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982); and Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969).

[35] This Court found the Texas system of selecting grand jurors through the key-man system to be facially neutral but "susceptible to abuse as applied." 430 U.S. at 497.

so easily lend themselves to discriminatory treatment.[36] The experience of the Circuit Courts has consistently condemned subjective practices:

> We have repeatedly held that subjective practices such as interviews and supervisor recommendations are capable of operating as barriers to minority advancement.

Griffin v. *Carlin*, 755 F.2d 1516, 1525 ((11th Cir. 1985).

In a pre-*Pouncy*[37] case, the Fifth Circuit Court of Appeals, in analyzing a strong statistical case showing that a General Motors Assembly Plant failed to promote blacks to supervisory positions, held:

> All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.

Rowe v. *General Motors Corporation*, 457 F.2d 348, 359 (5th Cir. 1972).

Even the Solicitor General agrees that subjective employment selection procedures are much more likely to result in a violation of Title VII:

> For a number of reasons, employers often prefer to use objective rather than subjective selection procedures. Standardized selection devices . . . by depriving personnel officers of discretionary authority, . . . help ensure that Title VII's proscription against intentional discrimination is obeyed by those with the greatest opportunity to engage in such discrimination.

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[36] *See* the discussion in section III above, and Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969).

[37] *Pouncy* v. *Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982).

Brief for the United States as Amicus Curiae, at 9-10, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139).[38] To prohibit disparate impact analysis of the procedures that are most susceptible of discrimination is going to encourage employers to adopt these procedures:

> Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions. It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than to validate objective criteria.

Griffin v. *Carlin*, 755 F.2d at 1525.

That this actually occurs has been the subject of observation by several commentators. "The litigious climate has resulted in a decline in the use of tests and an increase in more subjective methods of hiring." Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35, 35 (1985).[39]

The Fifth Circuit experience following *Pouncy*[40] is illustrative of the problem. Prior to the Fifth Circuit's 1982 decision in *Pouncy*, the Court had found that employment discrimination on the basis of race through various employment practices, including a minimum education requirement, had occurred at Travenol Laboratories, Inc. *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978). Travenol was prohibited by the District Court from "establishing facially neutral job prerequisites" except in accordance with EEOC

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[38] Curiously the Solicitor General seems to overlook Title VII's proscription against discriminatory effects. *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

[39] *See also* Tenopyr, *The Realities of Employment Testing*, 36 Amer. Psychologist 1136 (1981)(contending objective job testing is decreasing).

[40] *Pouncy* v. *Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982).

Guidelines. Rather than validating its procedures, Travenol instituted a subjective interviewing system which was then reviewed in the second decision of *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 806 (5th Cir. 1982). Meanwhile, however, the Fifth Circuit had decided *Pouncy* and when again Travenol appealed, the Court refused to apply the adverse impact model to the new subjective interview system. This counter-productive result is easily foreseeable.

The Solicitor General, arguing against the disparate impact test, foresees two results from adoption of Watson's position:

> . . . [A]llowing Plaintiffs to challenge subjective decisionmaking processes on a disparate impact theory, will force employers to either replace those selection procedures with objective ones or to eliminate any statistical disparities by using quotas.

Brief for the United States as Amicus Curiae, at 15, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139).

Requiring more objective criteria for employment selection procedures is a positive result that would foster job-relatedness in employee selection and advance Title VII's mandate to eliminate "barriers that have operated in the past to favor an identifiable group . . . over other employees." *Griggs* v. *Duke Power Company*, 401 U.S. 424, 429-30 (1971).

Instead of "fostering quotas," allowing plaintiffs to test subjective processes by impact analysis will provide an incentive for self-examination by employers of their compliance with equal employment goals:

> The "preferred means for achieving" this goal is through "cooperation and voluntary compliance."

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). As Justice O'Connor so aptly wrote in *Ford Motor Company* v. *EEOC*, 458 U.S. 219, 230, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982):

> Title VII's primary goal, of course, *is* [emphasis by the Court] to end discrimination; the victims of job discrimination want jobs, not lawsuits.

The alternative to subjective procedures is not quotas, but rather an intelligent examination of employment criteria so as to comply with Title VII goals. Nor is the validation of subjective criteria a difficult or costly task. In a well-reasoned and thorough review of the subject, Professors Doverspike, Barrett, and Alexander persuasively argue that validation studies can be both simple and inexpensive, and furthermore, cost effective. Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35 (1985). The Fort Worth Bank & Trust is a typical case in point. Rather than follow EEOC Guidelines for keeping records and testing for impact, the Bank simply ignored the regulations and never measured its practices impact.[41] In the face of the EEOC Guidelines and widely accepted, basic personnel practices, the Bank gave absolutely no instructions or criteria to the persons it left responsible for making hiring and promotion decisions.[42] If the Bank now prevails and disparate impact analysis cannot be used to examine its employment practices, is there any reason to believe that serious deficiencies already noted in the hiring and promotion of minorities will improve? Is there any reason to believe that the record keeping of the Bank will improve or that it will seriously consider examining its hiring and promotion practices?[43] If, as some commentators claim,

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[41] *See* U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 16 C.F.R. sec. 1607.15 (1987).

[42] Patricia Cullar testified that, as a supervisor, she was never given any guidelines or instructions on her hiring and promotion decisions. (J.A. 161-162). Her supervisor, Richard Burt, testified that no one reason could ever be given any particular weight in his decision to promote Cullar over Clara Watson because fifty or a hundred considerations typically enter into such decisions. (J.A. 134-135).

[43] Gary W. Shipp, Respondent's senior vice-president in charge of personnel, testifying at trial, answered in the negative:

> (Question by Mr. Brender): . . . I take it you wouldn't have any reason to change the bank's practices; is that right?
>
> (Answer by Mr. Shipp): I certainly would not.

(J.A. 177).

Griggs caused a reduction in objective job testing, then shielding the effects of subjective procedures from scrutiny will surely give employers an irresistible push to finally abandon objective employment standards.

VI. THE SUBJECTIVE CRITERIA IN AN EMPLOYMENT SELECTION PROCESS MAY MAKE IT IMPOSSIBLE TO PROVE INTENT UNDER *MCDONNELL DOUGLAS* v. *GREEN*.

As the Ninth Circuit pointed out in *Atonio* v. *Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987), subjective practices may be engendered by a "totally benign purpose" or simply carried out by "routine adherence to past practices whose original purposes are undiscoverable." 810 F.2d at 1484. If so, subjective practices are as "facially neutral" as an objective practice would be. In an early Title VII decision, the Fifth Circuit found subjective criteria to be facially neutral with regard to management's knowledge of the intent and/or stereotypes that cause adverse impact affecting minorities:

> . . . Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups. All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.

Rowe v. *General Motors Corporation*, 457 F.2d 348, 359 (5th Cir. 1972).

The Watson record reveals a similar lack of contact between whites and blacks at the Bank and even supervisor animus unbeknownst to management.[44] Gary Shipp's inability to

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[44] Clara Watson testified that blacks and whites sat at separate tables in the Bank's lunch room and that one white woman was disciplined by a supervisor who told her that she should "sit with her own kind." (Class Certification Hearing Transcript, pp. 42-43). The

explain evaluations indicating that blacks were performing a statistically significant ten points below whites and his inability to explain the huge difference in hiring rates between blacks and whites, when taken at face value, are typical examples of the type of routine adherence to "past practices" which make such subjective practices as neutral and lacking in intent as an objective practice would be.[45]

While objective practices may in fact be of a benign purpose, they can also be as the government argues, a covert means to discriminate intentionally. That being the case, however, as *Atonio*, points out, by definition "intent will be difficult to prove." 810 F.2d at 1484. That being the case, an often cited treatise on proof in discrimination cases argues that it is logical to apply the disparate impact doctrine to subjective practices which covertly discriminate.[46] Thus Gary Shipp's inability to explain the statistical disparities in the hiring, promotion and salaries of blacks may well suggest a covert intent to discriminate, but the evidence of such is locked within Shipp's mind. No

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supervisor made only a tepid denial that this had occurred. (Class Certification Hearing Transcript, pp. 286-87). There is also evidence that Gary Shipp did not socialize with blacks. (Class Certification Hearing Transcript, p. 43).

[45] The lack of any instructions or guidelines would not seem to stem from any purposeful discrimination, but yet have a high probability for allowing individual biases to affect employment decisions. Pat Cullar when questioned by the Court denied being given any instructions by anyone. . . . (by the Court) "Were you given any instructions by anyone connected with the Bank as to who to hire or not to hire?" . . . (answer by Ms. Cullar) "No sir." . . . (by the Court) "Or any matters whatsoever?" . . . (answer) "No sir, I make my own decisions." (J.A. 161). Cullar also stated that once she made a recommendation to management as to whom she wanted to hire, management hired them. (J.A. 162).

[46] See D. Baldus and J. Cole, *Statistical Proof in Discrimination*, sec. 1.23 (1980 and Supp. 1986), "The logic of the disparate impact doctrine appears to apply to covert legitimate policies, no matter how discretionarily they are applied, as well as it does to overt nondiscretionary criteria."

other evidence adduced at trial indicates that the system of wholly discretionary decisionmaking by supervisors in hiring and promotion was hatched as a plan or device by Shipp to prevent blacks from receiving equal employment opportunities.[47] In any event, the virtual impossibility of proving intent under such circumstances by disparate treatment analysis as set out in *McDonnell Douglas* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is obvious. The employer can always put forth a subjective reason for selecting the "best qualified" applicant, the one with the "best leadership" and "ability" and these facially neutral standards are impossible to rebut.

No better illustration of the impossibility of rebutting subjective criteria can be presented than the case at bar. Supervisors, such as Richard Burt and Pat Cullar, were provided with no standards whatsoever to guide them in determining whom they should hire or promote. (J.A. 135, 161). Richard Burt, when asked to explain the reason that he promoted Kevin Brown over Clara Watson to motor bank supervisor in 1981, stated that "in any decision like that, there's maybe fifty or one hundred things that really enter into it."[48] (J.A. 135). Mr. Burt

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[47] Other instances of Shipp's attitudes towards blacks may also be benign. For instance, a statement to Clara Watson that the teller position was a big responsibility with "a lot of money . . . for blacks to have to count," while arguably evidencing racial intent, can also be taken as evidencing a racial stereotype with no actual animus towards the individual involved. Shipp did promote Watson to teller, but his blunt statement about blacks counting money certainly indicates a racial stereotype of blacks as being poor, uneducated, never having been around money, and being unable to assume responsibility for counting large sums of it.

[48] In direct examination by the Bank's attorney, Burt cited experience, leadership ability, experience in supervising others, ability to get along with others, and *numerous* things (emphasis added) (J.A. 132). On cross-examination, he stated as follows: (by Mr. Brender) . . . But you mentioned experience, leadership, previous supervisory

refused to be pinned down even by the Court on any one particular reason as being the deciding one.[49] Leaving aside the difficulty of showing that subjective considerations such as leadership and an ability to get along with others are pretextual, it is impossible for a plaintiff to rebut fifty to one hundred criteria as pretextual, particularly when no one or two of the criteria are singled out as being the determining factor or factors in making the decision.

It seems only fair and logical to require the Bank with the knowledge of what its practices are and why it uses the methods and criteria it does, to shoulder the responsibility for explaining them. See *Atonio*, 810 F.2d at 1486; *Segar* v. *Smith*, 738 F.2d 1249, (D.C. Cir. 1984).

If the subjective employment practices of the Bank actually harbored a covert intent as the Government claims they must by definition, then the wisdom and perception of a federal District Court, a Court of Appeals and this Supreme Court have not been able to discern it. Yet the discriminatory effect on blacks remains. The impossibility of using disparate treatment analysis in such cases seems apparent.

VII. PERMITTING AN EMPLOYEE SELECTION SYSTEM WITH A DISCRIMINATORY EFFECT TO REMAIN IN EXISTENCE BY PROHIBITING THE ONLY PRACTICAL METHOD OF PROOF AVAILABLE TO ATTACK IT IS TO ENFORCE AN EXCLUSIONARY "QUOTA" SYSTEM ON MINORITIES AND WOMEN.

The Solicitor General in his amicus brief on behalf of the United States, argues that to permit the challenge to subjec-

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experience and ability to get along with others?—(answer by Mr. Burt) Those are the things that come to my mind. But in any decision like that, there's maybe fifty or one hundred things that really enter into it. (J.A. 135).

[49] When asked by the Court whether or not complaints about Clara Watson's performance had entered into his decision not to promote her, Burt stated "I think that is a factor. I would not say that that was the determining factor, but it is—you know, there is a lot of things that go into making a decision and that would be one of them." (J.A. 141).

tive employment selection procedures under disparate impact analysis will force employers either to replace those procedures with objective ones or to eliminate any racial disparities by using quotas. Brief of the United States as Amicus Curiae at 15, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139). The first of the Government's claimed effects would not only benefit equal employment opportunity, but also improve the efficiency and productivity of employers, a goal to be encouraged. The alternative proposed by the Government, that of requiring racial quotas, is not borne out by the evidence. Subjective procedures *are* capable of being cheaply and efficiently validated. Such validation may well provide a financial benefit to employers in terms of increased productivity.[50] Voluntary compliance with Title VII by adopting goals carefully tailored to remedy the effect of manifest imbalance in traditionally segregated job categories has been acknowledged as a necessary tool to enforce equal employment opportunities. *See Johnson* v. *Transportation Agency*, 480 U.S. , 108 S.Ct. , 94 L.Ed.2d 615 (1987). But that is not at issue here. Rather, it would appear that to adopt the position taken by the Respondent and the Solicitor General, that the Bank's subjective decision making processes are not subject to review for disparate impact, would be to encourage an ad hoc "quota" limiting equal employment opportunities in hiring, salary, and promotion at the Bank. The "quota" system is already in place. For every qualified black who comes to the Bank, three qualified whites

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[50] *See* the thorough discussion of the validation process in the Brief of the American Psychological Association as Amicus Curiae, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139). The APA Standards have been acknowledged by the EEOC as constituting the preferred method for the assessment of selection procedures since the first guidelines were issued in 1966. U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures (August 24, 1966). The current APA standards are incorporated into the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. sec. 1607.1 et seq. *See also* Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35 (1985).

must be hired.[51] Likewise, blacks receive ten fewer points than whites, on the average, on their evaluations and thus, less in merit raises each year.[52] Blacks advance at a rate six-tenths of a grade per year less quickly than whites even though similarly situated to the whites.[53] A racial "quota" has been imposed in this case limiting the opportunity of black applicants and employees at the Fort Worth Bank & Trust.

VIII. TO REQUIRE THAT SUBJECTIVE EMPLOYMENT SELECTION PROCEDURES BE VALIDATED WOULD NOT UNDULY BURDEN EMPLOYERS.

For over twenty years, the EEOC Guidelines have required that subjective employment selection procedures be validated. The very earliest court decisions[54] recognized the need to validate subjective decision making processes and ordered that those showing adverse racial impact be validated. Since 1966 with the publication of the first EEOC Guidelines and particularly since 1970, when the Guidelines took a form very similar to the current Uniform Guidelines, a consistent set of criteria and body of experience for evaluating the job relatedness of subjective employment practices have been available to employers. Extensive case law, both through Equal Employment Opportunity Commission decisions as well as in the federal courts, has developed to interpret and apply the administrative rules. The only real problem for employers seems to occur when they ignore the information available to them and fail, as the Bank did in this case, to perform the

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[51] The elimination of such a system whether intended or not is what Title VII was enacted to do.

[52] *See* the testimony of Tom Marshall, the Petitioner's statistical expert, as to the statistical analysis which shows the racially disparate impact on blacks of the Bank's decisionmaking procedures. (J.A. 77-105).

[53] *Id.*

[54] *E.g., Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

rudimentary record keeping necessary to do the self-analysis which the EEOC Guidelines require. The fact that nine of the twelve circuit courts have adopted the position advanced by the Petitioner, lends come credence to the belief that employers are not unduly burdened.

On the argument that subjective decision making procedures cannot be validated, the Petitioner would defer to the expertise of the American Psychological Association and the authority cited in its exhaustive and scholarly amicus curiae brief filed in this case. The 1966 EEOC Guidelines adopted the APA *Standards for Education and Psychological Tests and Manuals* as a basis for analysis of the job-relatedness of employment criteria.[55] This Court in *Albemarle Paper Company* v. *Moody*,[56] acknowledged that the 1970 Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association." 422 U.S. at 431. The Uniform Guidelines continue to draw upon the expertise of the APA and the Petitioner will do likewise. The APA's amicus brief outlines several areas in the Bank's basic personnel practices which are as inefficient as they are non-fulfilling of equal employment opportunity requisites. There are absolutely no written procedures for hiring or promotions. Nor was there any apparent attempt to define and implement prerequisites of the jobs so as to determine what qualities or talents are needed in persons chosen to fill those jobs. The job evaluation forms, which Dr. Marshall found to significantly and adversely impact on minorities, when analyzed by APA Standards, are clearly deficient in describing the behaviors of the employees in the jobs being evaulated. Furthermore, the factors that are important for promotability have never been properly weighed. The inefficiency of the Bank's practices, in addition to their adverse impact on minorities, is apparent. Seven months after Kevin Brown was pro-

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[55] U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures at 3-4 (1966).

[56] 422 U.S. 405, 431, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

moted to motor bank supervisor, Cullar found that he was only "close to being competent" and generally lacking in responsibility. (Pl. Ex. 3, R. I 63). Three months later, Brown resigned under pressure in light of decreased efficiency in the motor bank, and cited "poor communication and inadequate training." (Pl. Ex. 3, R. I 63). An objective analysis of the personality traits and characteristics necessary for the job, would undoubtedly have led to a more considered selection of a supervisor, to the advantage, rather than the disadvantage of the Bank. Literature and studies available for making such decisions are readily available and contrary to some contentions, not necessarily expensive, but rather cost efficient.[57] Content studies and validation generalization studies, which are approved by the Uniform Guidelines, are available to small employers whose record keeping indicates, by self-examination, that validation may be necessary.[58]

Unable to be seen above the trees of the argument concerning validating subjective practices, is a forest of impact. Before any validation must take place, the plaintiff must show impact.[59] Many of the commentaries that claim subjective practices should be free from disparate impact analysis base their arguments on small "mom and pop" concerns that are alleged to be unable to deal with the volume of psychological and psychometric information themselves or to incur the costs of a professional to do it for them. These arguments ignore the fact that impact must first be shown. As the *Atonio* Court points out, "The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact. . . ." 810 F.2d at 1486.

The great weight put on the plaintiff to produce impact evidence, combined with the vast body of validation informa-

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[57] Brief of the American Psychological Association as Amicus Curiae, at 22, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139); Doverspike, Barrett & Alexander, *supra*, and articles cited therein.

[58] *Id.*

[59] *See, e.g., Atonio.*

tion and experience available to employers, both large and small, alleviates any burden upon the employer whose employment practices adversely affect minorities so statistically significantly as to invoke the validation procedures set out in the Uniform Guidelines.

CONCLUSION

The Judgment of the Court of Appeals, upholding the Judgment of the District Court, insofar as it prohibited the Petitioner from having her case analyzed under the disparate impact theory, should be reversed.

Respectfully submitted,

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